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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 577

Case No. 617: KAOUAKIB

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Hubert Thierry;

Whereas at the request of Kenza Kaouakib, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 9 and 13 September 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 11 September 1991, the Applicant filed an application which contained the following pleas:

"4. The Joint Appeals Board [JAB] in its consideration of the Applicant's case erred in that it:

(a) did not fully apply its mind to the evidence which could have led to recommendations for:

(1) retroactive placement of the Applicant on probation effective May 1989;

(2) retroactive promotion of the Applicant from P-2 to P-3 effective April 1987; and

(3) an award of appropriate damages for the distress caused by ESCWA's discriminatory treatment; and

(b) rejected the evidence that would have proved the existence of discriminatory treatment.

5. The above errors by the JAB constitute the grounds of appeal in this case, and accordingly the Applicant requests joinder of three appeals, namely (a) that the period of probation should begin to take effect retroactively from May 1989; (b) that the Applicant should receive promotion effective April 1987; and (c) that the Applicant should receive compensation for the resulting distress which followed ESCWA's discriminatory treatment of the Applicant."

Wheras the Respondent filed his answer on 8 May 1991;

Whereas at the request of the Tribunal the Respondent produced documents on 12 November 1992, on which the Applicant submitted comments on 16 November 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 8 October 1984, as an Associate Programme Management Officer in the Programme Evaluation Unit of the Programme Planning and Coordination Unit of the Economic and Social Commission for Western Asia (ESCWA). She served initially on an 11-month fixed-term appointment at the P-2, step 1 level, later converted to a two-year fixed-term appointment expiring on 7 October 1986. Her appointment was extended first, for a further fixed-term period of two months, through 7 December 1986, and then for 1 year and 10 months, through 7 October 1988.

On 25 September 1988, the Chief, Programme Planning and Coordination Unit, recommended to the Deputy Chief, Personnel Section, the conversion of the Applicant's appointment to a probationary appointment. He attached to the recommendation a performance evaluation report in which the Applicant received eight "C" (Good) ratings, six "B" (Very Good) ratings and two "A" (Excellent) ratings. Her overall performance was rated as a "good" performance. The Applicant instituted a rebuttal to her evaluation and the Panel constituted to evaluate the rebuttal recommended a number of upgradings in the performance report. The Executive Secretary, in his apraisal of the performance report dated 11 December 1988, accepted the recommendation of the Panel to

upgrade the ratings concerning "quality of work" and "quantity of work" to "B" (Very Good), since the Panel had not found "any evidence that the supervisor had given any indication to the [Applicant] of a declining performance in these areas of her work". Similarly, he concurred in the Panel's recommendation to upgrade her rating for oral Arabic to "B" on the grounds "that after four years in an Arabic-speaking environment ... [the Applicant's] oral expression would not have declined compared to that level rated in her previous evaluation". In addition, he approved an upgrading of the Applicant's overall performance to "Very Good" based on the Panel's opinion that "in reviewing the individual ratings in the [Applicant's] performance ... her overall performance has not declined from the previous reporting period". The Applicant's appointment was extended for a fixed-term period of three months, through 7 March 1989.

On 13 February 1989, the Chief, Division of Administration, ESCWA, transmitted to the Chief, Staff Administration and Monitoring Service at Headquarters, ESCWA's recommendations for the conversion of fixed-term appointments to probationary appointments, together with a request that the cases of the staff concerned be presented to the Appointment and Promotion Committee (APC). The Applicant was one of the staff members listed in the communication. In a memorandum dated 29 March 1989, the Chief, Division of Administration, ESCWA, recommended to the Chairman of the ESCWA APC the conversion of the Applicant's appointment to a probationary appointment. In support of his recommendation, he stated that the Applicant's services had been evaluated three times and that, in her latest report, her performance had been rated "Very Good". In addition, the Office of Human Resources Management (OHRM) at Headquarters supported the recommendation.

Pending action by the appointment and promotion bodies, the Applicant's appointment was extended for further fixed-term periods of 1 month and 23 days, through 30 April 1989, 2 months, through 30 June 1989 and 2 months, through 31 August 1989.

On 12 April 1989, the Chairman of the ESCWA APC transmitted to the Appointment and Promotion Board (APB) at Headquarters the APC's unanimous recommendation to convert the Applicant's fixed-term appointment to a probationary appointment.

On 25 April 1989, the Chairman of the APB at Headquarters informed the Chairman of the ESCWA APC that "on the basis of information provided regarding the [Applicant's] record, the Board would prefer that [the Applicant] be granted an additional one-year extension of her fixed-term appointment before being considered for grant of a probationary appointment". He asked for the Committee's views on the recommendation. In a reply dated 4 May 1989, the Chairman of the ESCWA APC informed the Chairman of the APB at Headquarters that the APC had "considered the Board's proposal and concurs with it as it saw insufficient ground to oppose it".

In a cable dated 20 May 1989, the Applicant asked officials of OHRM at Headquarters for an explanation of the rejection of ESCWA's recommendation to convert the Applicant's appointment to probationary. On 22 May 1989, the Assistant Secretary-General, OHRM, asked the Chairman of the APB to inform him "of the information that served as a basis for the APB's views and its rationale for specifically suggesting a one-year extension". No reply to this request is to be found in the Applicant's file.

At its meeting held on 8 June 1989, the APB at Headquarters maintained its recommendation not to grant the Applicant a probationary appointment, but recommended that instead of extending her appointment for one year, she should be granted a two-year fixed-term appointment. This recommendation was accepted by the Secretary-General and the decision was conveyed to the Chief, Personnel Section, ESCWA, in a memorandum dated 13 June 1989. The Applicant then was offered and accepted a 1-year-and-10-months appointment, expiring on 30 June 1991.

From 13 June 1989 to 17 January 1990, the Applicant was assigned to the United Nations Transition Assistance Group in Namibia.

In June 1989, the Applicant instituted a recourse procedure against the non-inclusion of her name in the 1987 P-3 Promotion Register.

On 23 August 1990, the Applicant requested the Secretary-General to review the administrative decisions not to promote her to the P-3 level and not to convert her appointment to a probationary appointment.

Not having received a reply from the Secretary-General, on 21 February 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 9 July 1991. Its conclusions and recommendations read as follows:

"Conclusions and Recommendations

35. Essentially, the Appellant's appeal is against the decision of the Secretary-General, contained in the memorandum dated 13 June 1989 from the Secretary of the APB to the Chief, Personnel Section, ESCWA, which indicated: 'on behalf of the Secretary-General, the Assistant Secretary-General for Human Resources Management endorsed the Board's recommendation noting that the staff member's fixed-term appointment should be extended for a further two years'.

36. The Panel has not been acquainted with the alleged facts that led the APB to come to its conclusion on the issue of a probationary appointment for the Appellant. The Panel recognizes that it must tread carefully when called upon to examine the findings of a body such as the APB. The Panel cannot help observing however that a staff member who on all objective criteria, appeared to qualify for conversion to a probationary contract was not granted the conversion on the basis of alleged information that has never been disclosed to her or for that matter, as far as the Panel is aware, has never been disclosed, on the record, to the ASG [Assistant Secretary-General], OHRM, either. The Panel is therefore compelled to find a fundamental lack of due process in the proceedings of the APB which changed the original unanimous recommendation of the APC at ESCWA for reasons which have never come to light.

37. The Respondent's decision to endorse the Board's recommendation is equally lacking in due process and is all the more strange in view of the memorandum dated 22 May 1989 from the ASG, OHRM, to the Chairman of the APB.

38. The Panel is therefore of the view that, due to extraneous factors, the Respondent's decision on the issue of conversion to probationary status runs contrary to the principles of justice and of due process and should therefore be remedied. Had the Appellant been granted a probationary contract at the time, in accordance with the original unanimous recommendation of APC at ESCWA, she would already have served a two year probationary period.

39. The Panel notes that, on the information available to it, the Appellant has had a good service record and was granted a Special Post Allowance to the P-3 level for the period 16 June 1989 through 17 January 1990 for her service with UNTAG.

40. The Panel recommends that, assuming the continued good performance of the Appellant, the Secretary-General consider taking into account the two year delay as the probationary period and that the shortest possible stages be followed henceforth in reviewing the Appellant for conversion to a career appointment."

On 17 July 1991, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy of the JAB report and informed her that:

"The Secretary-General has re-examined your case in the light of the Board's report. He fully agrees with the Board's findings on the question of non-promotion. With regard to the non-granting of a probationary appointment, the Secretary-General has concluded that the contested decision which granted you a two-year fixed-term appointment rather than a probationary appointment constituted a proper exercise of administrative discretion.

Without prejudice to the above conclusion, the Secretary-General has decided to accept the Board's recommendation that you now be considered with due dispatch for the granting of a permanent appointment."

On 11 September 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's refusal to convert the Applicant's appointment to a probationary appointment and his subjection of the

Applicant to discriminatory treatment at ESCWA were not in conformity with the Staff Rules and violated the Applicant's rights.

2. The JAB rejected evidence that would have proved the existence of discriminatory treatment.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to probationary appointment but only to reasonable consideration.

2. The Applicant has no right to promotion but only to due consideration, which consideration was given.

The Tribunal, having deliberated from 26 October to 17 November 1992, now pronounces the following judgement:

I. In the present case, the Applicant challenges the Secretary-General's decision of 17 July 1991. That decision accepts the rejection by the Joint Appeals Board (JAB) of the Applicant's contentions concerning the refusal to include her name in the register for promotion to P-3 (Second Officer) for 1987. On the other hand, the Secretary-General rejects the conclusion of the JAB as to the irregularity of the decision whereby the Administration failed to grant the Applicant a probationary appointment. The Secretary-General nevertheless agreed to comply with the Board's recommendation that the Applicant "be considered with due dispatch for the granting of a permanent appointment".

II. As regards the Applicant's allegations of discrimination against her, the Tribunal observes that the JAB considered that there was no need for it to pronounce on an allegation of discrimination if the discrimination alleged had no impact on the contested decision. The Tribunal shares this view. It notes that, in exchange for a new assignment which she requested and was granted, the Applicant agreed to withdraw her complaint of alleged discriminatory treatment. Furthermore, the JAB correctly

interpreted the Tribunal's case law with respect to the duties performed by the Appointment and Promotion Board (APB) in drawing up promotion registers. In this respect, the JAB noted that the Applicant had been in a position to provide the APB with all the necessary information. The Tribunal has found no reason to consider that the action of the appointment and promotion bodies was at all irregular. It has, however, learned that, following her appeal, the Applicant received no communication informing her of the APB's decision. It regrets this omission. Nevertheless, the Tribunal considers that inasmuch as this omission did not impede the Applicant's appeal to the JAB, it is without impact on the settlement of this case.

III. The Tribunal also has taken into consideration the JAB's recommendation on the refusal in 1989 to grant the Applicant a probationary appointment leading to a permanent appointment. The JAB concluded that the procedure followed in this matter by the APB was irregular since there was doubt as to whether the APB had taken into account information that was unfavourable to the Applicant, relating to her private life which had not been communicated to her. The Tribunal observes, however, that the Secretary-General, while rejecting the JAB's finding as to the invalidity of the APB's recommendation, nevertheless accepted the JAB's recommendation, so that the candidacy of the Applicant could be taken into consideration for a permanent appointment and the service already performed treated as probationary. According to information provided to the Tribunal by the Respondent, this procedure is being followed and the Applicant will not be required to serve a probationary period. The Tribunal therefore holds that the Applicant's complaint on this subject is no longer applicable. The Tribunal has every confidence that the Secretary-General will ensure that his decision is implemented shortly if this has not already been done.

IV. The Tribunal further considers that the decision which the Secretary-General took, pursuant to the recommendation of the JAB, to waive the probationary period is adequate compensation in this case for any damage which the Applicant may have suffered in her career advancement.

V. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Hubert THIERRY
Member

New York, 17 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary